Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-2019

In The

Supreme Court of the United States

October Term, 1995

ACHILLES CORPORATION,

Petitioner,

v.

KAEPA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SEAGAL V. WHEATLEY
Counsel of Record
WHEATLEY & ONION, L.L.P.
1200 Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205
Telephone: (210) 227-5000
Facsimile: (210) 225-1555

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent believes that Petitioner has misstated the question presented for review and, thus, Respondent rephrases the question presented as follows:

> Whether the district court clearly abused its discretion in enjoining a party in pending litigation from maintaining a compulsory counterclaim in a foreign jurisdiction?

LIST OF PARTIES

Petitioner: Achilles Corporation

Respondent: Kaepa, Inc.,[1] known now as Apeak, Inc.

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[1] Pursuant to Supreme Court Rule 29.6, Respondent certifies that it has no United States parent, affiliate or subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kaepa, Inc. requests that this Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on February 14, 1996.

STATEMENT OF THE CASE

Respondent does not dispute the Statement of the Case in Petitioner's Brief except that Respondent supplements Petitioner's Statement of the Case by the following significant additions:

A. No important question or substantial conflict exists among the federal circuits sufficient to warrant the grant of certiorari. The federal circuits have reached different results simply because different factual situations were presented. None of the different results nor the facts presented here constitute questions of sufficient importance to require review.

B. No international tensions, either perceived or real, have been presented or argued as grounds for review on the basis of comity.

C. Simply stated, Petitioner and Respondent, both experienced business corporations, openly negotiated and agreed in a written distributorship agreement between them that:

1. The agreement *shall* be governed by the laws of the State of Texas; and

2. The agreement *shall* be enforceable in San Antonio, Texas; and

3. The English version of the agreement and the English language *shall* govern the interpretation and meaning of all words and phrases therein; and

4. Petitioner consented to jurisdiction in the State of Texas.

(*See* Petition for Writ of Certiorari, p. 2, fn. 1 (setting forth the applicable language of the distributorship agreement)).

Respondent, pursuant to the clear provisions of the agreement, brought suit in San Antonio, Texas, claiming Petitioner had breached the distributorship agreement and committed fraud. Months later, Petitioner, having availed itself of extensive discovery from Respondent and having utilized the United States district court, attempted to bring an identical suit in Tokyo, Japan concerning the same agreement and alleging that Respondent had also breached the agreement and committed fraud.

The case, including Petitioner's compulsory counterclaims, is now set for jury trial in San Antonio, Texas on February 10, 1997 and discovery is progressing.

This record is totally devoid of any action or order entered by the Tokyo court that would evidence any international tension between the United States and Japanese courts or any jurisdictional conflicts.

Furthermore, Petitioner has not appealed the district court's finding denying Petitioner's *forum non conveniens* motion. (*See* Petition for Writ of Certiorari, App. 4, fn. 2).

Petitioner concedes that the district court had the power to enter the order appealed from but argues that the district court had no discretion to find such duplicative foreign litigation should be enjoined by an order directed to Petitioner.

A review of each case relied upon by Petitioner demonstrates that each case was decided on its own unique facts and no important conflict exists among the federal circuits. Indeed, the basic question of whether a court should apply notions of international comity is a matter within the sound discretion of each court.

In addition, even the circuits that defer to international comity expressly recognize that such a notion, albeit vague, includes a consideration by the district court of the important factors of "convenience" and "the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. 113 (1895).

Petitioner's own referenced commentators concede that comity still includes "convenience" and "expediency" as two of its discretionary considerations. (*See* Petition for Writ of Certiorari, p. 14 & fn. 10).

Although courts have never laid down an absolute rule either for or against a rigid application of the notion of comity, it remains clear that circuits must be free to reach different results on different facts.

Petitioner cannot argue that its claims are somehow dependent on principles of international comity to govern its commercial affairs when Petitioner openly agreed to the precise litigation route that has ensued as set forth

in the distribution agreement. Thus, there is not presented to this Court a record involving a significant international event where tension exists between different country's jurisdictions or where there are events not foreseen involving notions of fairness to the unsuspecting victims of the conduct of others.

REASONS FOR DENYING WRIT

As set forth in the majority opinion of the Fifth Circuit Court and in Petitioner's Request for Writ of Certiorari, Petitioner's primary argument is that the district court failed to give proper deference to principles of international comity when it exercised its discretion in granting Respondent's motion for an antisuit injunction. While the Fifth Circuit recognized that "the circuits differ . . . on the proper legal standard to employ when determining whether that injunctive power should be exercised," the "difference" stems from some circuits' evaluation of the principle of international comity to the exclusion but not extinction of other factors. (*See* Petition for Writ of Certiorari, App. 6).

In fact, a review of the decisions cited by Petitioner reveals that no true "conflict" exists between the Fifth, Seventh and Ninth Circuit cases on one hand and on the other hand those circuits which focus more heavily on the issue of international comity. As fully set forth below, each circuit in reviewing the district court's discretionary acts of issuing an antisuit injunction focuses on varying factors which are inherently and appropriately dependent upon the facts in each case. Thus, the weight given to

certain factors in reviewing the district court's discretionary act vary based upon the circumstances and evidence presented in each case. The flexibility of the circuit courts in reviewing the district court's act of discretion does not create a substantial and important conflict to warrant review by this Court.

Furthermore, even if this Court views this flexibility among the circuits as a conflict, the application of these factors is not of sufficient importance to warrant the grant of certiorari. This is particularly true in light of the undisputed facts of this case which involve an international agreement of two private companies who clearly agreed that their disputes would be governed by the laws of the State of Texas and enforceable in San Antonio, Texas.

Finally, not only is the district court's issuance of an antisuit injunction based upon proper application of Fifth Circuit precedent, but clearly a district court's granting or denying of an injunction is an act within the sound discretion of the district court and does not warrant review by certiorari. *See Securities & Exchange Commission v. MacElvain*, 417 F.2d 1134, 1137 (5th Cir. 1969) (finding that the district court did not abuse its discretion in entering a permanent injunction), *cert. denied*, 397 U.S. 972 (1970).

I. Any Apparent Conflict of Authority Between the Federal Circuits is Not Sufficiently Important to Compel Supreme Court Review.

The Petitioner attempts to create a "split of authority among the circuits"[2] by classifying the varying

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[2] It should be noted that both commentators and courts refer to these varying standards as a "strict" view and a "lax"

approaches to the circuit court's review of a district court's discretionary act of entering an antisuit injunction as a "majority view" (District of Columbia, Second and Sixth Circuits) and a "minority view" (Fifth,[3] Ninth and Seventh Circuits). (*See* Petition for Writ of Certiorari, pp. 8-9). However, the distinction argued by the Petitioner does not rise to the level of a "conflict" sufficient to warrant Supreme Court review. In fact, an analysis of the circuit decisions cited by Petitioner reveals that the only

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view. These labels arise from the fact that the "strict" circuits (District of Columbia, Second and Sixth) primarily emphasize the notion of international comity and, thus, require a threat to the jurisdiction of the district court or an attempt to evade important public policies of the district court in order to affirm the district court's discretionary act of issuing an antisuit injunction. On the other hand, the "lax" circuits (Fifth, Ninth and Seventh) while they consider the notion of international comity a factor in affirming the district court's act of discretion, they do not do so to the virtual exclusion of essentially all other considerations. However, such labels as "strict" or "lax" add nothing to the basic tenet in all of these decisions that the court is merely exercising its powers in a discretionary manner.

[3] Curiously, Petitioner does not include the Fifth Circuit among the "minority rule" advocates, potentially because this would require the recognition of the fact that there is not a majority or minority rule as an equal number of circuit courts adopt one of the two standards which vary the degree of significance afforded the notion of international comity. *See Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied sub nom. Northwest Sports Enter., Ltd. v. Seattle Totems Hockey Club, Inc.*, 457 U.S. 1105 (1982) (adopting the factors set forth in the Fifth Circuit opinion *In re Unterweser Reederei, Gmbh*, 428 F.2d 888, 890 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

disagreement among the circuits is the level of importance and assumptions afforded potential threats to international comity. A review of each circuit's decisions clearly shows that the variations do not give rise to a true conflict amongst the circuits.

In fact, not only do those circuits emphasizing the notion of international comity give deference to vexatious litigation factors but those circuits focusing on vexatious litigation factors, upon proof thereof, give consideration to international comity. *Compare China Trade & Development v. M.V. Choong Yong*, 837 F.2d 33, 36 (2nd Cir. 1987) (concluding that equitable factors considered by the lax circuits are not alone sufficient to justify antisuit injunction and thus requiring the additional consideration of a threat to international comity) *and Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 929 (D.C. Cir. 1984) (stating that in addition to comity, vexatious litigation factors suggest possible bases favoring the district court's decision to enjoin foreign litigation but are not themselves controlling) *and Mutual Service Casualty Insurance Co. v. Frit Industries, Inc.*, 805 F. Supp. 919, 924 (M.D. Ala. 1992) (distinguishing Fifth Circuit case of *In re Unterweser Reederei, Gmbh* and stating that in that instance an injunction was justified to prevent "inequitable hardship" and frustration of the domestic court's policies regarding contracts) *with Allendale Mutual Insurance Co. v. Bull Data Sys.*, 10 F.3d 425, 430-31 (7th Cir. 1993) (concluding that circuits which first consider whether the foreign litigation is vexatious would thereafter give consideration to whether the issuance of antisuit injunction would cause a threat to international comity) *and Phillips Medical Sys. Int'l v. Bruetman*, 8 F.3d 600, 609 (7th Cir. 1993) (inclining

toward the lax standard but emphasizing the consideration of threat to comity upon receipt of evidence that the district court's injunction had jeopardized amicable relations between the two countries) *and Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 956 (D. Minn. 1981) (recognizing both that the principle of comity demands that the district court use caution in taking any action that would interfere with a foreign court and that adhering strictly to the principle of comity would prohibit the district court from reviewing multiple equitable considerations).

The lack of a true conflict among the circuits is exemplified by the Seventh Circuit's recent review of the "strict" and "lax" standards. *See Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993). In adopting the Fifth Circuit's approach, the court concluded the decision encompassed both the vexatious litigation factors as well as international comity. *Id.* at 430. Specifically, the Seventh Circuit opined as follows:

> When we say we lean toward the laxer standard we do not mean that international comity should have no weight in the balance; we do not interpret the "lax" cases as assigning it no weight. The difference between the two lines of cases has to do with the inference to be drawn in the absence of information. The strict cases presume a threat to international comity whenever an injunction is sought against litigation in a foreign court. The lax cases want to see some empirical flesh on the theoretical skeleton. They do not deny that comity could be impaired by such an injunction but they demand evidence . . . that comity is likely to be impaired in this

> case. When every practical consideration supports the injunction, it is reasonable to ask the opponent for some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States.

Id. at 430-31; *see also Phillips Medical Systems Inter.*, 8 F.3d at 609 (7th Cir. 1993) (declining to determine "whether the difference between the standards are more than verbal, that is, whether they eve[n] dictate different outcomes"). The Seventh Circuit went on to conclude that just as the "lax" cases should consider tangible evidence of a threat to comity, the "strict" cases must not refuse to give consideration to a threat to substantial U.S. interest. *Allendale Mutual Ins. Co.*, 10 F.3d at 431.

Thus, the distinction between the strict and lax standard is nothing more than the discretionary degree to which certain circuits emphasize a threat to international comity or, put another way, a variation of the assumptions afforded to potential threats to international comity in the absence of information. Furthermore, depending on the facts available to the district court, the district court's exercise of its discretion may be affirmed under both standards of review. Therefore, Petitioner's alleged conflict of authority between the federal circuits is not sufficiently important to compel Supreme Court review.

II. The Standard Applied to Review a Discretionary Act of the District Court in Issuing an Antisuit Injunction Lacks Importance to Warrant Supreme Court Review.

According to Supreme Court Rule 10.01, "a petition for writ of certiorari will be granted only when there are special and important reasons therefore." Sup. Ct. R. 10.01. As the Court has observed in the past, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case is not of importance to the public and, as set forth above, there is no conflict, much less an embarrassing conflict between the circuit courts of appeal. Nevertheless, Petitioner attempts to cloud the true issue on appeal by attacking the opinion of the lower courts as a proponent of the broad concept of international comity.

The fact of the matter is that the Fifth Circuit, as well as other circuit courts, has determined that while a threat to international comity is a factor for review of a district court's discretionary injunction of foreign litigation, it is not the only factor and absent evidence of a threat to the relations of the countries involved, the injunction must be upheld. *See Allendale Mut. Ins. Co.*, 10 F.3d at 431; *In Re Unterweser Reederei, Gmbh*, 428 F.2d 888, 892 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore*

Co., 407 U.S. 1 (1972). Thus, Petitioner's allegedly "important" and "significant" issue of comity was considered and rejected because there was no evidence that the district court's discretionary injunction threatened relations between the United States and Japan.

Moreover, the record on appeal is absent any evidence of the alleged concerns of the Petitioner. For example, Petitioner assumes, with no support, that under the proper standard of review employed by the Fifth Circuit, a situation *could* arise where both the district court and the foreign court enter antisuit injunctions which would bring the litigation to a standstill. (*See* Petition for Writ of Certiorari, pp. 12-13). Yet, there is not the slightest showing that the district court's proper injunction created the possibility that the Japanese court would enter a similar injunction preventing both actions from proceeding. Indeed, Petitioner totally fails to make any showing that relations between this country and Japan are threatened by this case.

Further, notwithstanding the broad brush manner in which the Petitioner phrased the "Question Presented" in its brief, the facts of this case do not present an important question affecting the public. Clearly, this case does not involve a public international issue. Both Petitioner and Respondent are private parties engaged in a contractual dispute which "has been long and firmly ensconced within the confines of the United State judicial system." (*See* Petition for Writ of Certiorari, App. 7). As recognized by the majority opinion of the circuit court below:

1. Petitioner has consented to jurisdiction in Texas;

2. Petitioner has stipulated that Texas law and the English language would govern any dispute;
3. Petitioner has answered and appeared in an action brought in Texas;
4. Petitioner has removed that action to federal court in Texas;
5. Petitioner has engaged in extensive discovery pursuant to the directives of the federal court; and
6. "[O]nly then, with the federal action moving steadily toward trial, brought identical claims in Japan."

Id. No matter how Petitioner attempts to rephrase the issue presented, clearly under the circumstances set forth above, it is impossible to conclude that "the district court's grant of an antisuit injunction in any way trampled on notions of comity." *Id.*

Therefore, Petitioner's Request for review by this Court is particularly unwarranted in light of the facts and issues of this case.

III. The Decision of the Court of Appeals Correctly Affirmed the District Court's Exercise of its Discretion and Application of Fifth Circuit Precedent.

In the present case, the circuit court's review of the district court's granting of injunctive relief to Respondent is reviewable under an abuse of discretion standard. *Western Directories, Inc. v. Southwestern Bell*, 63 F.3d 1378, 1390 (5th Cir. 1995), *modified on other grounds*, 74 F.3d 613 (5th Cir. 1996); *Apple Barrel Productions, Inc. v. Beard*, 730

F.2d 384, 386 (5th Cir. 1984). The district court is regarded as having abused it discretion only upon a showing that the court relied upon clearly erroneous findings of fact or used an erroneous legal standard when it improperly applied the law. *Peaches Entertainment Corp. v. Entertainment Repertoire Associates, Inc.*, 62 F.3d 690, 693 (5th Cir. 1995). The circuit court correctly determined that the district court properly applied long-standing circuit precedent to the undisputed facts of this case and, thus, acted well within its sound discretion in granting an antisuit injunction. (*See* Petition for Writ of Certiorari, App. 8).

As the majority of the Fifth Circuit stated in its opinion affirming the district court's order granting *Kaepa's Emergency Motion to Enjoin Achilles' Attempts to Prosecute its Compulsory Counter Claim in Tokyo, Japan*: "It is well settled among the circuit courts – including this one – which have reviewed the grant of an antisuit injunction that the federal courts have the power to enjoin person subject to their jurisdiction from prosecuting foreign suits." (*See* Petition for Writ of Certiorari, App. 4-5 (citations omitted)).

Thereafter, the majority properly applied Fifth Circuit precedent of *In re Unterweser Reederei, Gmbh* and *Bethell v. Peace*, wherein both cases held that a district court does not abuse its discretion by issuing an antisuit injunction when it has determined "that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.' " (*See* Petition for Writ of Certiorari, App. 5 (citing *In re Unterweser Reederei,*

Gmbh, 428 F.2d at 890; *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971)).

To the contrary, Petitioner urged the circuit court to adopt the approach of the Second, Sixth and D.C. Circuits which elevates principles of international comity to the virtual exclusion of essentially all other considerations.[4] The majority of the court declined to adopt this approach for several reasons, specifically including the fact that: (1) *Unterweser* and *Bethell*, while they focus on the potentially vexations nature of foreign litigation, by no means exclude the consideration of the principle of comity; and (2) most importantly, the majority declined "to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide" to exercise its discretion and enjoin a foreign action. (*See* Petition for Writ of Certiorari, App. 7-8).

Thus, after a review of the instant case, the majority opinion found that not only did the district court act within its clear discretion but the district court's grant of an antisuit injunction in no way "trampled on the notions of comity." (*See* Petition for Writ of Certiorari, App. 7). The majority opinion held that "the prosecution of the Japanese action would entail an absurd duplication of

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[4] Further, the majority opinion below noted "the weakness in the foundation of the dissent's opinion is that it relies extensively on these cases while virtually disregarding our holding in *Unterweser* and *Bethell*. The strict stare decisis policy of this court prevents us from joining in the dissent's abrogation of the holdings of two prior panels on this issue through purported distinctions without real differences." (*See* Petition for Writ of Certiorari, App. 6, fn. 12 (*citing United States v. Parker*, 73 F.3d 48, 51 (5th Cir. 1996)).

effort" and would result in unwarranted inconvenience, expense and vexation. (*See* Petition for Writ of Certiorari, App. 8). Petitioner's belated ploy of filing as putative plaintiff in Japan the very same claims against Respondent that Respondent has filed as plaintiff against Petitioner "smacks of cynicism, harassment, and delay." *Id.*

Respondent submits that not only did the majority opinion of the lower court properly affirm the district court's discretionary act of issuing an antisuit injunction but that the principle of comity to which Petitioner complains was improperly overlooked, was in fact considered by the circuit court and was found to be immaterial with regard to its review of the district court's discretionary act. Thus, this Court should deny Petitioner's writ of certiorari because the circuit court properly affirmed the district court's exercise of its discretion and application of Fifth Circuit precedent.

Finally, it must be remembered that a district court's order granting an injunction should not be disturbed by a reviewing court unless the grant was an abuse of discretion, which the circuit court of appeals did not find here. *See, e.g., Brown v. Chote*, 411 U.S. 452, 457 (1973); *Peaches Entertainment Corp.*, 62 F.3d at 693; *Securities and Exchange Commission v. MacElvain*, 417 F.2d 1134, 1136-37 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970).

In fact, this Court has previously declined to grant writ of certiorari upon a circuit court's finding that the district court did not abuse its discretion in issuing a permanent injunction. *See Securities and Exchange Commission v. MacElvain*, 417 F.2d 1134, 1136-37 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970).

As set forth herein and affirmed by the circuit court below, there is no doubt that the district court acted within its discretion by enjoining Petitioner from maintaining a compulsory counterclaim[5] in a foreign jurisdiction. A second review of this purely discretionary act is not warranted and therefore Petitioner's Request for Writ of Certiorari must be denied.

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[5] The majority of the circuit court recognized that the parties had "debated the applicability of Federal Rule of Procedure 13(a) to claims brought in foreign courts." (*See* Petition for Writ of Certiorari, App. 8, fn. 14.) Although Petitioner "concedes that under Rule 13, the Japanese action constitutes a compulsory counterclaim," the majority noted as follows:

> As we have decided on other grounds that the district court properly exercised its authority in enjoining the Japanese action, we need not address whether Rule 13 governs foreign suits. We note, however, that our holding today is consistent with the purpose of Rule 13, which is to " 'prevent multiplicity of actions and to achieve resolution in a single suit of all disputes arising out of common matters.' "

Id. (citing *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) (quoting *Southern Construction Co. v. Pickard*, 371 U.S. 57 (1962)).

CONCLUSION

In the final analysis, it simply makes no sense for this Court to grant review where the only result sought is to multiply the same pending case now set for trial into two separate trials and as a result eviscerate the underlying purpose of our own federal rules and emasculate Rule 13.

Respondent, Kaepa, Inc. respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

SEAGAL V. WHEATLEY
Counsel of Record
WHEATLEY & ONION, L.L.P.
1200 Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205
Telephone: (210) 227-5000
Facsimile: (210) 225-1555

Counsel for Respondent

July 16, 1996